and equitable that the respondent be wound up and I do make that order accordingly with costs to the petitioner and other supporting creditors to be taxed.

Application allowed.

Solicitors: *Ong Ban Chai & Co; Chong & Harcharan.*

Reported by *Yap Shao Sin*

Daniel s/o D William v Luhat Wan & Ors

Luhat Wan v Social and Welfare Services Lotteries Board & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NOS P1433 OF 1985 AND A24 OF 1985
LIM BENG CHOON J
12 APRIL 1989

Tort — Detinue, conversion and trespass to goods — Right to property of social welfare lottery ticket — Right to immediate possession of ticket — Right of finder — Plaintiff given possession of ticket by person who had misappropriated it — Proof of purchase of ticket by first defendant — Fraud committed by driver of first defendant — Whether lottery ticket a chattel

Contract — Illegality — Unauthorized person selling lottery ticket — Contract fully executed — Effect of illegality

In this case, the plaintiff in the first action claimed that he had found a lottery ticket crumpled up at an Esso station. Later he found that the ticket had won the third prize in the Tenth Social and Welfare Services Lottery draw. The first defendant, however, claimed that he had a right to the property and possession of the social welfare lottery ticket which had won the third prize. The first defendant claimed that he had bought the lottery ticket and given it with other lottery tickets to his wife for safe keeping. While the first defendant was away in Sarawak, their driver asked the wife for the bundle of tickets in order that he may check them. Subsequently the driver returned the bundles but without the winning ticket. The first defendant made a report and called as witnesses the person from whom he bought the tickets and his wife. The learned trial judge accepted the evidence of the first defendant and his witnesses and rejected that of the plaintiff.

Held, dismissing the plaintiff's claim:

(1) The evidence showed that the first defendant bought the social welfare ticket and that his driver obtained it by fraud. The plaintiff's claim that he found the ticket was rejected and the court found that he had obtained the ticket from some person.

(2) In the circumstances the plaintiff could not be said to have acquired any right of property in the lottery ticket; neither could it be said that he had a better right to immediate possession of the ticket. His right, if any, must come from the possessory right vested in the driver who committed the fraud which in law is subservient to that of the first defendant, his master.

(3) The plaintiff had dealt with the lottery ticket in question in a manner inconsistent with the right of the first defendant and therefore has committed conversion of the ticket. The lottery ticket in this case is a chattel and action lies for its conversion.

(4) Although the seller of the lottery ticket to the first defendant was unauthorized and had therefore committed an offence in selling it without authority, in this case the illegal contract had been fully executed and therefore the title to the lottery ticket passed to the first defendant.

(5) There is no doubt at all that the plaintiff had neither the title nor the right of possession to the winning ticket. In such a situation judgment must be given for the first defendant since the court does not confiscate the property because of illegality.

[*Editoiral Note*: The plaintiff (Daniel s/o D William) has appealed to the Supreme Court vide Civil Appeal No 02-178 of 1989.]

Cases referred to

1 *Clayton* v *Le Roy* [1911] 2 KB 1031 (refd)
2 *Armory* v *Delamirie* [1558-1774] All ER Rep 121 (refd)
3 *Hannah* v *Peel* [1945] KB 509 (refd)
4 *Parker* v *British Airways Board* [1982] 1 All ER 834 (refd)
5 *Fowler & Ors* v *Hollins & Ors* (1872) LR 7 QB 616 (refd)
6 *Marfani & Co Ltd* v *Midland Bank* [1968] 1 WLR 956 (refd)
7 *Farquharson Bros Co* v *C King & Co* [1902] AC 325 (refd)
8 *Jerome* v *Bentley* [1952] 2 All ER 114 (refd)
9 *Johnson* v *Credit Lyonnais Co* (1877) 3 CPD 32 (refd)
10 *Bute (Marquess)* v *Barclays Bank Ltd* [1955] 1 QB 202 (refd)
11 *Central Newbury Car Auctions Ltd* v *Unity Finance Ltd & Anor* [1957] 1 QB 371 (refd)
12 *USA and Republic of France* v *Dollfus Meig et Cie SA and Bank of England* [1952] AC 582 (refd)
13 *Corporation of London & Ors* v *Appleyard & Anor* [1963] 2 All ER 834 (refd)
14 *Sardara Ali* v *Sajan Singh* [1957] MLJ 165 (folld)
15 *Sajan Singh* v *Sardara Ali* [1960] AC 167; [1960] MLJ 52 (folld)
16 *Belvoir Finance Co Ltd* v *Stapleton* [1971] 1 QB 210 (folld)
17 *Eastern & Oriental Hotel (1951) Sdn Bhd* v *Ellarious George Fernandez & Anor* [1989] 1 MLJ 35 (distd)
18 *PP* v *Yeap Kok Ooi* (Alor Star High Court Criminal Trial No 18 of 1984) (unreported) (folld)
19 *Mohamed Ali* v *PP* [1962] MLJ 230 (refd)
20 *Munusamy* v *PP* [1987] 1 MLJ 492 (refd)

Legislation referred to

Evidence Act 1950 s 114(g)
Social and Welfare Services Lotteries Board Act 1950 s 9

Karpal Singh for the plaintiff.
Zainur Zakaria for the first defendant.

Cur Adv Vult

Lim Beng Choon J: This civil suit instituted by Daniel a/l D William registered by this court as Civil Suit No P 1433 of 1985 as well as an earlier suit instituted by Luhat Wan registered as Civil Suit No A24 of 1985 (now given a new registration reference No 22-132 of 1987) concerned the right of possession of the social welfare lottery bearing No 1471576 which won the third prize in the Tenth Social and Welfare Services Lottery draw in the year 1985 held on 11 July 1985 at Taiping, Perak.

Before I proceed to consider the merits of the case, I think it is relevant for me to explain why I have to postpone the delivery of this judgment from 10 April 1989 to today. Although it is not necessary and indeed it will serve no useful purpose to proffer such an explanation, nevertheless, in view of the public interest that has been generated by the institution of this civil suit and the two-day hearing of the case, I think it is relevant to give such an explanation. The reason is simply this: learned counsel, Mr Karpal Singh, had, in the course of his submission, laid before this court a number of issues on points of law (as can be seen later in this judgment). With due respect to him, he had not produced any firm authorities to support or otherwise the issues raised by him. Again, with respect to learned counsel Mr Zainur Zakaria, acting for Luhat Wan, he too was not able to produce any firm authorities to assist this court. However that may be, I do not think that I should unduly reprimand either of them (and I do not have the slightest intention of doing so) considering that the law applicable to detinue, conversion and trespass to goods is not easy to understand, and in particular 'conversion' to which Vaughan Williams LJ had adverted as a word that 'is very often used but it is not very easy to understand what it means'. (See *Clayton* v *Le Roy*[1] at p 1054.) It is doubtful whether the meaning of the word has become appreciably clearer since 1911. In fact the author of *Clerk and Lindsell on Torts* (14th Ed) (2nd Impression 1979) made this opening remark in the chapter on conversion and other injuries to chattels which I quote: 'The modern law concerning the protection of interests in chattels is greatly complicated by the historical background ...'. It is however incumbent on me to deal with the issues raised by Mr Karpal Singh. I have expended much exercise in delving into the law and such delving is inevitably time consuming. Hence the delay.

The next preliminary matter which I would like to make an observation on relates to procedural rules applicable to the consolidation of the two civil suits. The two suits, namely, CSP 1433 of 1985 and CS A24 of 1985 were consolidated by an order of this court issued on 19 December 1985 but no direction had been given (or asked for) as to the conduct of the trial of the consolidated actions. I have my doubt as to the correctness of the consolidation bearing in mind that while in one action one of the parties is suing as a plaintiff, in the other action the same party is being sued as a first defendant. As stated in the *Supreme Court Practice* (1979 Ed) at p 163: '... the same person cannot be both a plaintiff and a defendant in the same action or an applicant and a respondent to the same summons'. No doubt in the present case, the same person has not been made a plaintiff and a defendant in the same action but rather in different actions, nevertheless the effect is the same in that at the trial of the consolidated actions this court would have to hear a party who is the plaintiff in one action and also a defendant in another action. The correctness of the consolidation is therefore questionable if not on any other grounds, at least on the ground that it might well cause much embarrassment to the parties concerned, particularly as to the question of onus of proof. Be that as it may, it is fortunate that I need not labour on this matter as all the parties had unreservedly consented to the consolidation. What is more important however is that the question of onus of proof is not seriously debated. From the conduct of the trial, all parties appeared to have taken for granted that the onus of proving the ownership or the right to possession of the winning ticket No 1471576 was on the plaintiff in CS A24 of 1985 (the first defendant in CS P1433 of 1985), namely, Luhat Wan and the trial had been conducted with this presumption in mind. Such presumption is in my view correct. Furthermore, when I asked Mr Karpal Singh at the outset about the failure on the part of the parties to ask for directions, he said that the plaintiff in CS 1433 of 1985 was prepared to open his case and all parties agreed to this suggestion. That being the case, I allowed the case to proceed, bearing in mind that O 15 r 6 of the Rules of the High Court 1980 could very well apply and this court can secure the determination of all disputes relating to the same subject matter without delay and thereby obviate the incurring of unnecessary expenses of separate actions — see p 179 of the *Supreme Court Practice* (1979 Ed).

One final matter. As a matter of convenience, I shall hereinafter call Daniel a/l D William as the plaintiff and Luhat Wan as the first defendant unless otherwise specifically mentioned. Again for convenience, I shall hereinafter refer to the ticket No 1471576 as 'the winning ticket' and the Social and Welfare Services Lotteries Board as 'the board'. Now to the merits of the case.

I do not propose at this stage to set out the facts of this case as I will be dealing with this matter at a later part of this judgment. It is sufficient to state that the plaintiff is relying solely on the schoolboy maxim of 'finding is keeping' to sustain his right to possession of the winning ticket and hence as holder thereof he is also entitled to the prize money of $125,000. In contrast, the first defendant is claiming ownership of or his right to immediate possession of the winning ticket by reason of his purchase of the said ticket some two weeks before the draw date of 11 July 1985. Hence, he too claimed that he is entitled to the prize money of $125,000. When I add that the first defendant also alleged that the winning ticket had been fraudulently taken out of his possession on 12 July 1985, this will give a new and illegal twist to the present case — see paras 10 and 11 of his statement of claim in the bundle of pleadings.

Now it is undoubtedly important for this court to identify the real question which it has been asked to answer. To put it simply, the question is this: Who has the better right of the property in the winning ticket or alternatively who has the better right to immediate pos-

session of the winning ticket — the plaintiff or the first defendant? That in my view is the crux of the problem.

Turning to the pleadings of the parties, I have very little doubt that the plaintiff had pegged his cause of action solely (as I have stated earlier) on the schoolboy maxim of 'finders keepers'. On the other hand, the first defendant in his role as plaintiff in CS No A23 of 1985 had asked for a declaration coupled with a claim for detinue or conversion. In order to get a declaration, it was essential for the first defendant to show that he was the owner of the winning ticket or at least he had the right to immediate possession of the winning ticket at the time of commencing the action (see pp 420 and 425 of *Bullen & Leake's Precedents of Pleadings* (11th Ed)).

Now let us turn to the case law and see what it has to say. The common law right asserted by the plaintiff has been recognized for centuries. It was asserted by a chimney sweep boy who in 1722 found a jewel and handed it to a jeweller for valuation — see *Armory* v *Delamirie*.[2] The jeweller subsequently refused either to pay a price acceptable to the boy or to return it and the boy sued the jeweller for its value. Pratt CJ in that case ruled:

> That the finder of a jewel, though he does not by such finding acquire an absolute property or ownership, yet he has such a property as will enable him to keep it against all *but the rightful owner* and consequently may maintain trover (emphasis is mine).

The finder's right to the possession of a chattel as against all, save its owner, was reiterated in *Hannah* v *Peel*[3] — see the headnote — and *Parker* v *British Airways Board*.[4] As to the gist of liability in conversion, reference may be made to the following passage of Cleasby B in his judgment in *Fowler & Ors* v *Hollins & Ors*[5] at p 639:

> The action of trover is not founded upon contract or upon any particular relation of the parties, but upon property, and supposes the owner to have lost the goods, as the plaintiffs may in some sense be said to have done in this case, and the liability under it is founded upon what has been regarded as a salutary rule for the protection of property, namely, that persons deal with the property in chattels or exercise acts of ownership over them at their peril.

This observation of Cleasby B was reiterated albeit, in a different form, nearly a century later by Lord Diplock in *Martani & Co Ltd* v *Midland Bank Ltd*[6] at p 970:

> At common law, one's duty to one's neighbour who is the owner, or entitled to possession, of any goods is to refrain from doing any voluntary act in relation to his goods which is a usurpation of his proprietary or possessory rights in them. Subject to some exceptions which are irrelevant for the purposes of the present case, it matters not that the doer of the act of usurpation did not know, and could not by the exercise of any reasonable care have known, of his neighbour's interest in the goods. The duty is absolute; he acts at his peril.

Now let us turn to another situation in respect of which the law is reasonably clear. It has been judicially acknowledged that where an innocent third party acquired goods from the owner's servant or agent who had appropriated the goods fraudulently from his master, the third party cannot be said to have any right of the property in or any possessory right to the said goods. The property in the said goods must still remain with the owner who can sue for their return. There is a long line of cases which had dealt with this proposition. The first of such cases is *Farquharson Bros Co* v *King & Co*.[7] There, a dishonest clerk of Farquharson Bros & Co, using a false name and abusing his authority, obtained some of his employers' timber from the dock company which warehoused it and sold the timber to King & Co. On becoming aware of the facts, Farquharson Bros & Co sued King & Co for conversion. It is to be noted that King & Co were completely unaware of the fraud carried out by the dishonest clerk. Earl of Halsbury LC, in expounding this proposition, said quite emphatically (at p 329):

> ... but for that I should have said that this was a particularly plain case in which no difficulty whatever arises. I think it might be stated compendiously in two sentences. A servant has stolen his master's goods, and the question arises whether the person who has received those goods innocently can set up a title against the master. I believe that is enough to dispose of this case.

His Lordship went on to say (see the last paragraph of the same page):

> Well, if it was a stealing, how has the person who has received the goods acquired a right to those goods which, it is equally not denied, originally belonged to the appellants in this case? When has the property been changed, and by what circumstances? It is impossible, I think, to answer that question except in one way. There has been no property changed: the thief could give no title whatever. The circumstances of this case show conclusively that there is nothing to prevent this being a theft, and, it being a theft the thief could convey no title. That disposes of the case.

Lord MacNaughten, adopting a similar approach, was equally firm when he said at p 335:

> To try the principle, take a common case — a case which everybody understands. Nothing is better settled than this, that if a person buys a chattel and it turns out that the chattel was found by the person who professed to sell it, the true owner can recover his property, unless there has been a sale in the market overt. The right of the true owner is not prejudiced or affected by his carelessness in losing the chattel, however gross it may have been.

The second of such cases is *Jerome* v *Bentley*.[8] There, one Major Tatham, to whom the rightful owner had earlier entrusted him with a diamond ring to sell within seven days after which he was supposed to return it to the owner, fraudulently represented himself as the owner of the same and sold it to the defendant who bought it in good faith and resold it. The owner thereafter sued the defendant for wrongful conversion of the ring. In holding the defendant liable, Donovan J cited the following passage (see p 118 of the reported case) from the judgment of Cockburn CJ in *Johnson* v *Credit Lyonnais Co*:[9]

> The case for the plaintiff rests on the general proposition of law — which as a general proposition cannot be contested — that the mere possession of the property of another, without authority to deal with the thing ... otherwise than for the purpose of safe custody, as was the case here, will not, if the person so in possession takes upon himself to sell or pledge to a third party, divest the owner of his rights as against the third party, however innocent in the transaction the latter party may have been.

His Lordship then went on to say (see the same page para G):

> If I carelessly leave my front door unlocked so that a thief walks in and steals my silver, I have, in a sense, enabled him to steal it by not locking my door, but that does not prevent my recovering it from some innocent purchaser from the thief otherwise than in market overt.

Then we have the case of *Bute (Marquess)* v *Barclays Bank Ltd.*[10] In that case McNair J rejected the defendant's plea that the plaintiff was not owner of certain converted warrants and so could not sue and held that the plaintiff's immediate right to possession entitled him to sue in conversion. The relevant passage of the learned judge's speech appears at p 211 of the reported case and I quote:

> As to the first ground, the short answer, in my judgment, is that in order to claim in conversion, it is not necessary for the plaintiff to establish that he is the owner of the property alleged to have been converted. It is sufficient if he can prove that at the time of the alleged conversion he was entitled to immediate possession. Inasmuch as McGaw's employment was terminated not later than 9 May 1949, and thereafter the plaintiff could clearly have been entitled, had he been so minded, to require McGaw to deliver the warrants to him when received, since his only title to receive them stemmed from his appointment as manager, I think it is clear that at the date of the alleged conversion in September 1949, the plaintiff was entitled to immediate possession and, accordingly entitled to sue in conversion. I have no doubt that, if the plaintiff had known the true facts in September 1949, before McGaw approached the bank, he could successfully have applied for an injunction to restrain McGaw from dealing with the warrants otherwise than by handing them over to him. Such injunction would properly have been granted on the ground that McGaw's right to receive and retain the warrants or their proceeds had lapsed when his employment ceased.

Finally we have the case of *Central Newbury Car Auctions Ltd* v *Unity Finance Ltd & Anor.*[11] In that case, a distinguished looking stranger, who gave his name as Cullis, arranged to buy a Morris car from the plaintiff company. After signing all the necessary papers, the plaintiff company allowed Cullis to take away the car and the registration book applicable to it contrary to the terms of the hire-purchase agreement. The registration book showed that the last owner of the car was one C Ashley but this Ashley did not sign his name in the space provided. Three days later a man driving the Morris car called on a third party's garage and gave his name as C Ashley. The man was probably Cullis who had since disappeared. He had also appended a purported signature of C Ashley in the registration book. He offered to sell the Morris car to the third party who accepted the offer. Later the third party resold it to the first defendant company and they in turn let it out on hire to the second defendant. In a claim for conversion made against the defendants, they pleaded, inter alia, that the plaintiff company were estopped from denying the authority of Cullis to sell the car as they had permitted him to take away the car and the registration book without any sufficient enquiries. This plea was rejected and it was held by a majority judgment (Denning LJ dissenting) that the defendants were liable for conversion although they were unaware of the plaintiff's title or the fraud committed by Cullis. To round up the case law applicable to an action for detinue or conversion, one last case that I wish to refer is *USA and Republic of France* v *Dollfus Meig et Cie SA and Bank of England.*[12] There, Lord Porter gave a legal definition of constructive possession when he said (see p 611):

> The nearest, I suppose, is *Ancona* v *Rogers* (1876) 1 Ex D 285, a decision on the words 'apparent possession' contained in s 1 of the Bills of Sale Act 1854 (17 & 18 Vict c 36). In delivering the judgment of the court in that case Mellish LH said: 'There is no doubt that a bailor, who has delivered goods to a bailee to keep them on account of the bailor, may still treat the goods as being in his own possession, and can maintain trespass against a wrongdoer who interferes with them. It was argued, however, that this was a mere legal or constructive possession of the goods and that in the Bills of Sale Act the word 'possession' was used in a popular sense and meant actual or manual possession. We do not agree with this argument. It seems to us that goods which have been delivered to a bailee to keep for the bailor, such as a gentleman's plate delivered to his banker, or his furniture warehoused at the pantechnicon, would, in a popular sense, as well as in a legal sense, be said to be still in his possession.'

I shall now revert to the evidence adduced at the trial. I have carefully considered the totality of the evidence and I can say at once that the story of the plaintiff is inherently incredible. The view I formed not only from the evidence given by the plaintiff but also from the way he gave it, is to put it bluntly that he is a liar. I say this particularly because of the way he gave his evidence-in-chief. At that stage he was quick with his answers — indeed at times he was able to give his answers even before the court interpreter could translate the relevant questions to him. However, when he was confronted by the learned senior federal counsel, Mr Lim Heng Seng, with the statement which he gave the police under s 112 of the Criminal Procedure Code (FMS Cap 6) ('CPC') in an attempt to impeach him, I could discern his true character. He began to shuffle his evidence and at times resorted to play for time before he would give a direct answer to a simple question. I think I have said enough on this point and I should not touch on the contents of the statement made by the plaintiff to the police as I have rejected the application for impeachment made by Mr Lim Heng Seng. I need only to reiterate that I am fully convinced that the version of the plaintiff is highly and inherently incredible and I

say so for these reasons. First, the chances of being present at the right spot at the right time to retrieve the winning ticket blown by providence must, to my mind, be the same if not less than the chances of winning a third prize of a social welfare lottery draw! Second, and more importantly, I have no doubt, from my scrutiny of his evidence, that someone must have had possession of the winning ticket prior to the moment on 8 August 1985 when the plaintiff claimed he picked it up at the Esso petrol station. Bearing in mind that the first defendant or at least his wife had possession of the winning ticket up till the noon of 12 July 1985 before it was found missing in the afternoon of the same day, it must follow that that someone must have discarded it after the draw results had been published in the press. That being the case, it is beyond any reasonable man's comprehension as to why that someone would have discarded it when he knew or ought to have known that that ticket had won the third prize of $125,000. I would even go to the extent of holding that even Sivalingam, the driver of the first defendant, would not have discarded it after having taken the trouble of fraudulently appropriating (and as can be seen later I do find that he had indeed fraudulently appropriated) the winning ticket from the first defendant. Third, it is again inherently incredible that having noticed that the draw had taken place some 28 days earlier when he picked up the winning ticket, nevertheless, he would still retain it for another eight days before he made an attempt to check it against the draw results. In mentioning this I have not overlooked his explanations which, to my mind, are equally incredible. Assuming for a moment that he used to buy empat ekor tickets, I still cannot understand why he should keep the winning ticket for more than a week before he checked it against the results of the draw. He asserted in cross-examination that he bought the empat ekor tickets on 9 August 1985, that is, one day after he had retrieved the winning ticket and he also asserted that the empat ekor draw took place one or two days after 9 August 1985. If that be the case, I simply cannot see why he should still keep the winning ticket. Any innocent and reasonable man would have thrown the winning ticket away, if not soon after retrieving it, at least after having seen the empat ekor results on 11 August 1985. To lend further credence to his story, the plaintiff went on to say that he had earlier bought some welfare lottery tickets and he only commenced to check them against the draw results on 16 August 1985, that is the same day in which he checked the winning ticket. This statement of his is best expressed and be rejected for the simple reason that it is unbelievable that any reasonable man would have waited for no apparent reason for well over a month to check his tickets. Finally, he claimed that the winning ticket had been crushed into a ball when the wind blew it to his feet. I have scrutinized the winning ticket (exh P3) with care and I am fully satisfied that it would not have been in the state as it now is, had it been crushed into a ball earlier. In the ultimate analysis, I am more than satisfied that the version presented by the plaintiff is nothing but a pack of blatant lies which no one in his right mind can swallow.

Turning to the version presented by the first defendant, I must say that I can without any hesitation accept his version as the truth. Quite apart from the fact that he had called three witnesses, one of whom is clearly an independent witness (DW2) to corroborate his story, what is more important is that his story is inherently credible and straightforward. His version can be compendiously expressed in this way — he bought some social welfare lottery tickets, and one of the tickets bearing No 1471576 won the third prize; unfortunately before he could claim the prize the winning ticket was fraudulently removed from his possession and he did not see it again until the police recovered it from the plaintiff. What can be more simple or straightforward than this I would not venture to think! Furthermore, I must say that I have no reason to question the credibility or integrity of the witnesses for the defence. To my mind, they are witnesses of truth. In the ultimate analysis I find as a fact that:

(a) the first defendant did purchase the winning ticket from DW2 some 10 to 14 days prior to 11 July 1985;
(b) the first defendant handed the winning ticket to his wife (DW3) for safekeeping;
(c) DW3 had possession of it as agent of the first defendant;
(d) his driver, Sivalingam, fraudulently removed the winning ticket from the possession of DW3 at noon of 12 July 1985;
(e) the winning ticket was not seen until the police recovered it from the plaintiff when he went to the office of the board on 16 August 1985 to collect the prize money.

As the story of the plaintiff has been rejected by me, it is safe for this court after a careful assessment and weighing of the evidence, on the balance of probabilities, to arrive at the following conclusions, viz that at the time of appropriating the winning ticket, the plaintiff must have or at least ought to have known that:

(i) prior to his coming into possession of the winning ticket, someone must have owned or have possession of it;
(ii) he had no right to the special or absolute property in the winning ticket;
(iii) the right to the special and absolute property in the winning ticket remained with the rightful owner;
(iv) his right of possession was purely transitory until such time when the rightful owner exercised his right of dominion of the same;
(v) the rightful owner could easily be located if the plaintiff would take the trouble of referring the matter to the police or offices of the board.

The next step which I should now take is to apply the principles of law discussed earlier to the proven facts in the present case. In view of my findings of fact as adumbrated above, it must follow as surely as the night follows the day that the plaintiff did not 'find' the winning ticket within the context of the popular saying 'finding is keeping'. At its best, I would say that he might well have been given possession of the winning ticket by someone and he knew nothing about the fraud committed by Sivalingam. Even in these circumstances, the plaintiff could not be said to have acquired any right of the property in the winning ticket; neither could it be said that he had a better right to immediate possession of the same. His right, if any, must come from the possessory right vested in Sivalingam which in law is subservient to that of the first defendant, the master. (See *Armory* v *Delamirie*,[2] *Farquharson Bros Co* v *C King & Co*,[7] *Jerome* v *Bentley*,[8] *Johnson* v *Credit Lyonnais & Co*[9] and *Central Newbury Car Auction Ltd* v *Unity Finance Ltd*[11] cited above.) That being the case, the plaintiff could not be regarded as having any right to possession of the winning ticket. The most that can be said about his right is that it is of a transitory possession until such time when the first defendant asserted his right to immediate possession of the same. And this took place when he visited the office of the board on 16 August 1985. On the other hand, the fact that Sivalingam had fraudulently taken the winning ticket out of the possession of the first defendant cannot in law cause the first defendant to lose his right to the property in the winning ticket or his right to immediate possession of it. Sivalingam was a servant of the first defendant and his possession of the winning ticket was the possession of the first defendant, his master. At any rate, Sivalingam could give no title to anyone. That should dispose of this case but for three other matters. I shall deal with two of the matters first and these relate to the ingredients of conversion, namely, (i) whether the plaintiff had dealt with the chattel in question in a manner inconsistent with the right of the first defendant, and (ii) whether the winning ticket can properly be considered as chattel. I have carefully considered point (i) and I am satisfied that the plaintiff's acts amount to an absolute denial of the first defendant's title. He was told at the office of the board that the first defendant had lodged a police report about the missing ticket; he knew that he himself did not purchase the said ticket. His conduct right from 16 August 1985 until the date when he filed his suit clearly shows that he was and still is adamant in laying claim to the winning ticket and at the same time to deny the first defendant's right. As regards point (ii), it has been said before that negotiable instruments and other securities such as guarantees, insurance policies and bonds considered as corporeal property are simply pieces of paper. Their sole value is as choses in action. Nevertheless, if they are unlawfully converted and detained, the person entitled may recover full damages to the extent of the loss (see *Clerk and Lindsell on Torts* (14th Ed) at para 1104). Furthermore, although title deeds, cheques and bank notes are not properly speaking chattels, it has always been held that they can be sued for in conversion or detinue (see for instance *Bute (Marquess)* v *Barclays Bank Ltd*[10] and *Corporation of London & Ors* v *Appelyard & Anor*[13]. I am therefore inclined to hold and I do so hold that the winning ticket is a chattel and an action lies for the conversion of the same.

The case however is far from being over as there is still the third matter. The ticket seller (DW2) admitted under cross-examination that he had not been issued with a written authority either by the Director-General of Posts or the chairman of the board to sell welfare lottery tickets. It is perhaps understandable that Mr Karpal Singh would make an issue out of such admission. It is also equally understandable that Mr Zainur Zakaria would and in fact did apply to me to adduce additional evidence to show that DW2 was wrong in making the admission. I need not labour on the application of Mr Zainur as I had rejected his application and the grounds for my rejection are fully stated in my judgment which is appended here as App I [not reported]. In his submission, Mr Karpal Singh contended (if I have not misunderstood him) that since the first defendant elected to prove his title by proving that he was the owner of the winning ticket, the only way in which he could do so was to rely on the contract of sale of the winning ticket entered into by DW2 and the first defendant. The contract of sale was, so said Mr Karpal Singh, clearly illegal since the transaction infringed s 9(1) of the Social and Welfare Services Lotteries Board Act 1950 which reads as follows:

> No tickets or chances in any lottery promoted by the Board under this Act shall be sold or distributed otherwise than on behalf of the Board and either —
>
> (a) by a person authorized in writing in that behalf by the Director General of Posts and at a Post Office or through a Postal Agency established under the Post Office Act 1947; or
>
> (b) by a person authorized in writing in that behalf by the Chairman of the Board and at such place or places as the Chairman of the Board may, by notification in the Gazette, specify.

Such an infringement is a statutory offence by virtue of sub-s (2) of s 9 of the said Act and the punishment of such offence is prescribed in s 17 thereof. Now let us turn once again to the case law to seek guidance.

The first case which I would refer to is *Sardara Ali* v *Sajan Singh*.[14] In that case the plaintiff purported to buy a lorry from the defendant and it was contended by the defendant that the contract of sale was void for illegality. Nevertheless, when the defendant removed the lorry from the plaintiff's possession and refused to return it, it was held by the Court of Appeal that the plaintiff could maintain an action in trespass. In holding so, Thompson CJ (with whom Barakbah J agreed) observed (at p 166) as follows:

For the purposes of the present argument it may be accepted that the plaintiff and the defendant practised a deceit on the public administration of this country in order to get a haulage permit for the vehicle. I am unable to agree, however, that the plaintiff had to prove this in order to prove his case in the present proceedings. The action was not in contract. It was an action for trespass to goods. In order to succeed in it, the plaintiff had to prove that he was in possession of the lorry and that the defendant seized and took it away. The defence was that it was not the plaintiff's lorry. The plaintiff's reply to that was that it was his lorry. There was no need for him to go into the question of how the lorry came to be registered in the name of the defendant except by way of anticipating any argument that might be set up on behalf of the defendant based on that registration. The lorry became his as a result of one or possibly two agreements with the defendant which may well have been bad as being contrary to public policy, but the consideration that these agreements were bad did not prevent the property in the lorry passing to him (see *Simpson* v *Nicolls* (1838) 3 M & W 240 and *Scarfe* v *Morgan* (1838) 4 M & W 270). The property having passed and the plaintiff having obtained possession, I fail to see why the plaintiff should not have his possession protected and his property or its value restored to him. As was said by Parke B in *Scarfe* v *Morgan* (1838) 4 M & W 270:

'... this is not the case of an executory contract; both parties were in pari delicto — it is one which has been executed, and the consideration given; and although in the former case the law would not assist one to recover against the other, yet if the contract is executed, and a property, either special or general, has passed thereby, the property must remain.'

The case went on appeal to the Privy Council — see *Sajan Singh* v *Sardara Ali*.[15] In approving the approach adopted by Thompson CJ, Lord Denning said (see p 176):

Although the transaction between the plaintiff and the defendant was illegal, nevertheless it was fully executed and carried out: and on that account it was effective to pass the property in the lorry to the plaintiff. There are many cases which show that when two persons agree together in a conspiracy to effect a fraudulent or illegal purpose — and one of them transfers property to the other in pursuance of the conspiracy — then, so soon as the contract is executed and the fraudulent or illegal purpose is achieved, the property (be it absolute or special which has been transferred by the one to the other remains vested in the transferee, notwithstanding its illegal origin: see *Scarfe* v *Morgan* (1838) 4 M & W 270, 281, per Parke B. The reason is because the transferor, having fully achieved his unworthy end, cannot be allowed to turn round and repudiate the means by which he did it — he cannot throw over the transfer. And the transferee, having obtained the property, can assert his title to it against all the world, not because he has any merit of his own, but because there is no one who can assert a better title to it. The court does not confiscate the property because of the illegality — it has no power to do so — so it says, in the words of Lord Eldon: 'Let the estate lie where it falls; see *Muckleston* v *Brown* (1801) 6 Ves 52, 69. This principle was applied by the Court of Appeal recently in *Bowmakers Ltd* v *Barnet Instruments Ltd* [1945] KB 65, 70. The parties to the fraud are, of course, liable to be punished for the part they played in the illegal transaction, but nevertheless the property passes to the transferee.

In a later case of *Belvoir Finance Co Ltd* v *Stapleton*,[16] Denning MR explained the legal principle in greater clarity. In that case, counsel for the defendant argued strongly that as the finance company were never in possession of the car they could not rely on the proposition: 'As against a wrongdoer, possession is title'. The finance company, so argued counsel, must therefore rely on the agreement of sale in order to give them title or a right to possession. But the agreement was illegal and counsel therefore urged the Court of Appeal not to allow the finance company to rely on it since it was settled beyond controversy that the court should not lend its aid to anyone who had to rely on it. Be it noted that here Karpal Singh too adopted a similar argument. In rejecting the distinction taken by counsel, Lord Denning MR said (see p 217):

I think that the proposition stated in *Sajan Singh* v *Sardara Ali* [1960] AC 167, 176, applies even where the transferee has not taken possession of the property, so long as the title to it has passed. If this were not so, it would mean that anyone could take the property with impunity: because there would be no one who could show a title to it. Take this very case. The dealers, who sold the car to the finance company, cannot claim it back from anyone. They have received their price and are out of the picture. Belgravia, who resold the car illegally to a purchaser, cannot claim it from him or anyone else: for they have received the price too. The only persons who can claim it are the finance company who paid for it and have not been repaid. Although they obtained the car under a contract which was illegal, nevertheless inasmuch as the contract was executed and the property passed, the car belonged to the finance company and they can claim it. This was the view of Winn LJ in *Kingsley* v *Sterling Industrial Securities Ltd* [1967] 2 QB 747, 783, and I agree with it. *Bowmakers* [1945] KB 65 was rightly decided, even though this point was not argued.

Applying the principles expounded in the authorities cited above to the present case, I am inclined to hold and I do so hold that assuming that the contract of sale between DW2 and the first defendant was illegal, nevertheless, since the illegal contract was fully executed and the title to the winning ticket had passed to the first defendant, the winning ticket must belong to the first defendant. Besides, the plaintiff has no title to the winning ticket since, as I have stated earlier, his right could not be placed any higher than the possessory right of Sivalingam, the fraudulent driver, which is inferior to that of the first defendant, his master. In the result, there is no doubt at all in my mind that the plaintiff has neither the title nor the right of possession to the winning ticket. In such a situation judgment must be for the first defendant since this court does not confiscate the property because of illegality (see *Sajan Singh* v *Sardara Ali*[15]).

It remains now for me to consider the remaining contentions raised by Mr Karpal Singh in his submission. First, he contended that from the manner in which Mr Zainur had conducted the case for the first defendant, it was incumbent on the first defendant to prove that his driver Sivalingam had in fact committed theft of the winning ticket. This, he said, the first defendant had failed

to do and he relied on the case of *Eastern & Oriental Hotel (1951) Sdn Bhd* v *Ellarious George Fernandez & Anor*[17] to support his contention. With due respect, I cannot see any merits in this contention. Here we have the evidence of the first defendant who said categorically that when he returned from Miri, Sarawak on the afternoon of 12 July 1985 and asked his wife for the tickets, he was told by his wife that their driver, Sivalingam, had earlier asked for the two bundles of tickets. Sivalingam was accordingly given the two bundles of tickets by the first defendant's wife to enable him to check. After Sivalingam had done so, he purportedly returned the two bundles (exhs D8A and D8B) to the wife of the first defendant. These tickets in the two bundles were disarranged, that is to say, they were not placed in proper sequence. When the first defendant took over possession of the tickets from his wife he found that the winning ticket was no longer in bundle D8A. The evidence of the first defendant was corroborated by that of his wife DW3. Indeed, DW3 gave a simple and clear account of what transpired when Sivalingam saw her at noon on 2 July 1985. Her evidence can be summarized thus: Sivalingam wanted the two bundles of tickets to check against the results of the draw. She gave them to him as she trusted him. Sivalingam checked. DW3 did not bother to see how he carried out the check as she was busy cleaning the window panes. Sivalingam purportedly returned the two bundles of tickets to her. She just put them away without counting the number of tickets in the bundle. Later in the afternoon of the same day, the first defendant asked for the said tickets and she handed them to him after telling him of the visit of Sivalingam. It was only when the first defendant had checked the two bundles that he realized the fraud committed by Sivalingam. Another witness, namely, the bodyguard of the first defendant (DW4), also confirmed that after the first defendant had discovered that the winning ticket was missing, a meeting was called by the first defendant and attended by Silvalingam. He also said that the first defendant had also indicated to him that he suspected that Sivalingam had stolen the winning ticket. In view of the evidence given by these three witnesses, whose integrity I have no doubt at all, can one still say that the first defendant has failed to prove beyond any reasonable doubt that Sivalingam had fraudulently appropriated the winning ticket? There can only be one answer to this question and it must be in the negative. I do not therefore think that there are any merits in the contention of Mr Karpal Singh.

The second contention of Mr Karpal Singh was that since Mr Zainur had persistently put to the plaintiff in the course of cross-examining him about his knowledge of the theft committed by Sivalingam and the relationship between the plaintiff and Sivalingam, it was incumbent on the first defendant to substantiate what Mr Zainur had been putting to the plaintiff. I had an occasion to deal with such a contention when I was hearing a criminal trial at the Alor Setar High Court. Mr Karpal Singh had in his submission at that trial raised a similar contention which I had held to be without any merits, and I would likewise reject the contention in the present case. My grounds for the rejection had been fully given in my written judgment in that criminal case (see *PP* v *Yeap Kok Ooi*[18]) and I need only to repeat the following passage from that judgment:

> After all, there is no magic in the words 'I put to you' — the significance of these words depends on why, when and how they were used in the cross-examination. In certain circumstances, the putting of a matter across to a witness may tantamount to nothing more than a mere suggestion or a proposal or to emphasize that the assertions of the witness are highly incredible.

Here learned defence counsel had, by putting these questions to the plaintiff indicated to him the stand which the first defendant was going to take and it was this: the winning ticket was earlier misappropriated by Sivalingam. That stand was fully justified by the evidence given by the defence witnesses. What more could the defence do, for after all Sivalingam was not on trial in the present case and it was the plaintiff who brought out this person Sivalingam in his evidence-in-chief.

In his third contention Encik Karpal Singh drew the attention of this court to the fact that in failing to call one Karuppiah Elangoven, the proprietor of the firm who was said to have distributed the 9,000 welfare lottery tickets for the tenth draw in the year 1985 to DW2, the exh D9 tendered by the first defendant should be discarded since there was a grave doubt as to the right of DW2 to sign as pengurus of the firm. Furthermore, so said Mr Karpal Singh, this court should draw the presumption under s 114(g) of the Evidence Act 1950 against the first defendant, ie that Karuppiah, if called, would give evidence unfavourable to the first defendant. Again, with respect, I do not think there is any merit in this contention. DW2 had categorically said that it was he who prepared and signed D9 since at the material time the said Karuppiah Elangoven was in India. What is more important is that there is nothing in the evidence to show that D9 was defective; neither was the evidence of DW2 shown to be incredible. At any rate it has been said before that the presumption in s 114(g) of the Evidence Act 1950 should not be drawn automatically or by the rule of thumb — see *Mohamed Ali* v *PP*[19] at p 232 and *Munusamy* v *PP*[20] at p 494.

The last contention of Mr Karpal Singh was that since DW2 stood to gain should the first defendant succeed in obtaining judgment in his favour as the former would get a commission from him, DW2 was therefore an interested party whose evidence could not be believed. The short answer is that there is no evidence to support this contention of counsel; indeed the evidence clearly shows that DW2 was entitled only to a 2% commission in respect of

every ticket he sold and he was not entitled to any winning ticket commission.

Now I do not think that I have missed out any issue or contention raised by counsel. I need only to confirm that there must be a verdict for the first defendant and I accordingly do so. The plaintiff's action is dismissed with costs. One final word. The maxim applicable in the present case is not 'finders keepers' but rather 'loser weepers'.

Claim dismissed.

Solicitors: *Karpal Singh & Co; Zainur & Maydien.*

Reported by *Prof Ahmad Ibrahim*

Ting Jie Hoo v Lian Soon Hing Shipping Co

HIGH COURT (SIBU) — SUIT NO 46 OF 1984
CHONG SIEW FAI J
30 MARCH 1989

Tort — Negligence — Negligence occurring in course of employment — Duty of care owed to employee — Standard of care — Due care — Defence of inevitable accident — Volenti non fit injuria

Civil Procedure — Pleadings — Defence — Denial of allegations in statement of claim — Deviation of evidence from pleadings — Contributory negligence — Must be pleaded

Damages (Personal Injury or Death) — Pain and suffering — Loss of amenities — Loss of earnings — Burden of proof on plaintiff — Duty to mitigate loss

The plaintiff was employed by the defendant as a labourer. On 7 September 1982, the plaintiff was involved in an accident while handling the wire-rope of a crane mounted on a barge on a river. The plaintiff claimed that when the crane's engine was started, the boom suddenly swayed towards him and struck him on his legs. He suffered (a) a punctured wound on the lower left thigh; (b) a deep lacerated wound over the right leg; (c) fracture of the lower right tibia; (d) fracture of the fourth and fifth metatarsal bone of the left foot; and (e) fracture of the medial malleolus on the left foot. There was a 2cm shortening of the right leg, the right leg was slightly bent and the last two toes of the left foot could not be straightened. The plaintiff claimed damages for pain, suffering and loss of earnings. The defendant pleaded the defence of inevitable accident and, alternatively, volenti non fit injuria.

Held, allowing the plaintiff's claim:

(1) In their defence, the defendants pleaded that the plaintiff meddled with the crane contrary to instructions. However, the defence witnesses testified that the plaintiff did nothing but place his hands on the boom. This deviation of evidence was of material significance where the evidence of the parties were in sharp contrast. In addition, the defendants had not specifically denied, in their pleadings, the plaintiff's allegation that he was handling the wire-rope when the engine was started. In consequence, the court accepted the plaintiff's testimony on this point.

(2) However, the plaintiff failed to prove on a balance of probabilities that the engine was started, causing the boom to sway. The court, however, accepted that the boom was allowed to rest on an empty oil drum when not in use and found that there was no evidence to show that the boom was secured in any way when at rest.

(3) At common law, the duty of an employer towards his employees is to take reasonable care for their safety in all the circumstances of the case so as not to expose them to an unnecessary risk. The standard of care which the law demands is the care which an ordinary prudent employer would take. In each case the nature of the employment must be considered, and in measuring due care it is necessary to balance the risk against the measures necessary to eliminate the risk. Where the employer is a company, it is liable for the negligence of its servants towards a fellow servant where the negligence occurs in the course of his employment.

(4) Given that the Rejang is a busy river, the risk that waves brought about by passing motor vessels might cause the boom of the crane to fall was reasonably foreseeable. There had been a breach on the part of the defendant as employer to exercise reasonable care for the safety of the plaintiff as its employee which had materially contributed to the plaintiff's injuries.

(5) The burden of proof of inevitable accident was on the defendants and they had failed to show that the fall of the boom caused by the waves was inevitable.

(6) As for the plea of volenti, the defendants must show that the plaintiff fully appreciated the dangerous nature of the work and risks involved and acted as a volunteer in the strictest sense. At the time of the accident, the plaintiff had been in the defendants employ for only 12 days. There was no evidence that he understood and appreciated the risk and danger of his work nor that he volunteered in carrying out the work.

(7) The defence asked the court to consider the question of contributory negligence, but as this had not been pleaded it was not available to the defendants.

(8) There would be an award of $20,000 for pain and suffering.

(9) The plaintiff had failed to show that he was unable to work till the date of the trial. He was in a position to resume work between January and April 1986. There is a duty on the part of the plaintiff to mitigate loss and as it was not possible to state with certainty when the plaintiff could resume work, a middle course would be adopted and August 1985 be taken as the time when the plaintiff could begin work. Accordingly, loss of earnings would be calculated from the date of the accident to 6 August 1985 and a sum of $14,000 be awarded.

(10) As the plaintiff could resume work, this was not an appropriate case to award loss of future earnings. However, the plaintiff had suffered a loss of earning capacity and was entitled to an award of general damages for disability suffered. The plaintiff was 37 years old in 1985 and taking 55 as the retirement age and allowing 1/3 from this for contingencies of life, the years of purchase would be fixed at 12. A figure of $21,500 was therefore awarded as loss of earning capacity. But there would be no interest on this award.